(1)

Supreme Court, U.S.
FILED

No. 001518 MAR 26 2001

IN THE OFFICE OF

Supreme Court of the United States

MICHAEL McGINNIS, Superintendent,
Southport Correctional Facility

Petitioner,

- against -

RONALD MASK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney, New York County

MORRIE I. KLEINBART
SUSAN AXELROD*
Assistant District Attorneys

New York County District Attorney's Office
One Hogan Place
New York, New York 10013
(212) 335-9000

* *Counsel of Record for the Petitioner*

March 26, 2001

64 pp

QUESTIONS PRESENTED

1. On federal habeas corpus review, may a federal court ignore the deferential mandate of 28 U.S.C. Section 2254(d)(1) solely because the state court has not explained its reasoning in detail?

2. Has a criminal defendant established that he was denied effective assistance of counsel when his claim is that an error by his attorney foreclosed plea negotations causing him to proceed to an admittedly fair trial?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

The Plea Negotiations 4
The Post-Judgment Proceedings In State Court 7
The Appeal To The Appellate Division 9
The Proceedings In Federal District Court 10
The Appeal To The Second Circuit 11

REASONS FOR GRANTING THE WRIT 13

Introduction 13

I. As A Result Of the Second Circuit's Decision, The Circuits Are Split On How To Determine Whether To Apply The AEDPA To State Court Decisions 14

II. In The Wake Of Williams v. Taylor, Guidance Is Needed On How To Resolve Claims of Ineffective Assistance Of Counsel When A Defendant Protests An Error At The Plea Bargaining Stage Of A Proceeding And The Defendant Received A Fair Trial 18

CONCLUSION 21

APPENDIX ..... infra

TABLE OF AUTHORITIES

FEDERAL CASES

Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000) 15

Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991).....17

Hennan v. Cooper, 109 F.3d 330 (7th Cir. 1997) 15

Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985) ..10, 19

Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996).....14

Long v. Humphrey, 184 F.3d 758 (8th Cir. 1999).....15

Mabry v. Johnson, 467 U.S. 504, 104 S. Ct. 2543 (1984).....19

Neal v. Puckett, No. 99-60511, 2001 U.S. App. LEXIS 659 (5th Cir. 2001) 14, 15

Mask v. McGinnis, 233 F.3d 132 (2d Cir. 2000).....2, 12, 15, 16

Mask v. McGinnis, 28 F.Supp.2d 122 (S.D.N.Y. 1998) 2, 10, 11, 19

O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998).....15

Paxton v. Ward, 199 F.3d 1197 (10th Cir. 1999) 18

Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495 (1971).....19

Schaff v. Snyder, 190 F.3d 513 (7th Cir. 1999).....15

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).....13

United States v. Gordon, 156 F.3d 376 (2d Cir. 1998) 10

Washington v. Schriver, No. 00-2195, 2001 U.S. App. LEXIS 129 (2d. Cir. 2000).....17, 18

Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1479 (2000).....13, 14, 15, 17, 19

Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998).....15

STATE CASES

Cottle v. State, 733 So. 2d 963 (Fla. 1999).....20

Harris v. State, 875 S.W.2d 662 (Tenn. 1994).....20

Johnson v. Commissioner, 652 A.2d 1050 (Conn. App. Ct. 1995).....20

Lloyd v. State, 373 S.E.2d 1 (Ga. 1988).....20

People v. Curry, 687 N.E.2d 877 (Ill. 1997).....20

People v. Mack, 223 A.D.2d 383, 637 N.Y.S.2d 2 (1st Dept. 1996).....2, 10

People v. Mask, 88 N.Y.2d 1069, 649 N.Y.S.2d 395 (1996).....10

State v. Garrison, 2000 Tenn. LEXIS 652 (Tenn. 11/22/2000).....20

State v. Kraus, 397 N.W.2d 671 (Iowa, 1986).....20

Williams v. State, 605 A.2d 103 (Md. 1992).....20

STATUTES

Sup. Ct. R. 13 3

28 U.S.C. Section 1254(1).....3

28 U.S.C. Section 2254..... passim

New York Criminal Procedure Law Section 440.10.....2, 7, 8, 9

New York Penal Law Section 70.04.....7

New York Penal Law Section 70.08.....5

NO. __-__

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

MICHAEL MCGINNIS, Superintendent, Southport Correctional Facility,

Petitioner,

v.

RONALD MASK

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Michael McGinnis, Superintendent of the Southport Correctional Facility, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on February 8, 2001, affirming the judgment of the district court which conditionally granted respondent's petition for a writ of habeas corpus unless petitioner agreed either to reduce

petitioner's sentence to a term of from eight to sixteen years or vacate his conviction and grant him a new trial.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at No. 99-2071, 233 F.3d 132 (2d Cir. 2000) (Oakes, Calabresi and Parker, JJ.). The decision is reprinted in the appendix of this petition at p. 1a, infra.

The order of the Court of Appeals for the Second Circuit denying petitioner's request for a panel rehearing and rehearing en banc is not reported. It is reprinted in the appendix at p. 19a, infra.

The order of the United States District Court for the Southern District of New York (Chin, J.), is reported at 28 F.Supp.2d 122 (S.D.N.Y. 1998). It is reprinted in the appendix at p. 20a, infra.

The order of the New York Court of Appeals denying respondent Ronald Mask's application for leave to appeal to that court from the decision of the Appellate Division, First Department is reported at 88 N.Y.2d 1069, 649 N.Y.S.2d 395 (1997). The decision of the Appellate Division, First Department unanimously affirming the judgment is reported at 223 A.D.2d 383, 637 N.Y.S.2d 2 (1st Dept. 1996). It is reprinted in the appendix at p. 30a, infra.

---

[1] The petitioner is represented in this proceeding by the District Attorney of New York County, New York, by agreement with the Attorney General of the State of New York.

The decision of the trial court denying respondent's motion to vacate the judgment is not reported. It is reprinted in the appendix at p. 32a, infra.

JURISDICTION

This petition for a writ of habeas corpus was filed in the Southern District of New York invoking federal jurisdiction under 28 U.S.C. §2254. On November 4, 1998, the Southern District conditionally granted the petition unless Mask was resentenced to a term of from eight to sixteen years or his conviction was vacated and he was granted a new trial.

On November 15, 2000, the Second Circuit affirmed that order. Respondent filed a petition for a panel rehearing or a rehearing en banc on November 29, 2000. The Second Circuit denied that request by order dated January 3, 2001 and then issued its mandate on February 8, 2001.

This petition for certiorari is filed within ninety days of the date on which petitioner's petition for a panel rehearing or rehearing en banc was denied and is therefore timely. Sup. Ct. R. 13. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2254(d)(1) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . .

STATEMENT OF THE CASE

Respondent Ronald Mask committed a series of knife point robberies in New York County during the period from August 29, 1990 to September 24, 1990. He was indicted by a New York county grand jury on three courts of Robbery in the First Degree. He was subsequently convicted, after a jury trial, of two counts of Robbery in the First Degree and one count of Robbery in the Third Degree. On February 10, 1992, the court sentenced him to two consecutive prison terms of from nine to eighteen years on the first-degree robbery counts, to run consecutive to a prison term of from two to four years on the third-degree robbery charge for an aggregate prison term of from twenty to forty years.

The Plea Negotiations

During the pendency of the indictment, Mask and the prosecutor engaged in plea negotiations. Throughout those negotiations, the court, the prosecutor and defense

counsel operated under the mistaken assumption that Mask was a persistent violent felony offender. Consistent with that status, the prosecutor offered Mask a prison term of from ten years to life in exchange for his plea of guilty to one count of Robbery in the First Degree, the mandatory minimum for such an offender (New York Penal Law 70.08). Mask declined that offer.

Prior to the beginning of a hearing on Mask's motion to suppress physical evidence and identification testimony, the trial court asked the parties whether there was any possibility of a disposition. Mask's attorney responded that he had conferred with Mask and that Mask had rejected the prosecutor's offer. The prosecutor then noted that she had offered Mask the minimum available to a persistent felony offender charged with Robbery in the First Degree.

On the next adjourned date, the court again inquired about the possibility of a guilty plea, this time advising Mask that he needed to appreciate the risks involved in proceeding to trial. According to the court and the prosecutor, Mask was eligible to receive a sentence of from thirty years to life. The prosecutor also informed the court that, if Mask were convicted after trial, she would be requesting that his sentences run consecutively to any sentence that he might receive on a pending unrelated grand larceny charge, as well as on pending bail jumping charges. The court also remarked that the evidence of Mask's guilt was strong and explained that he wanted to ensure that Mask did not later regret having turned down a reasonable offer. Trial counsel responded that he had spoken with Mask about the guilty plea and had warned him that the charges against him were serious. Nonetheless, Mask had refused the People's offer.

After the hearing but prior to trial, the court revisited the plea question. The prosecutor reminded the court of Mask's sentencing status and of his exposure if convicted after trial. The prosecutor again stated that the offer of ten to life was the lowest sentence she was permitted to offer.

Counsel responded that, although he recognized that the law did not require the prosecutor to make any plea offer, the prosecutor could decline to file a predicate felony statement, and thus negotiate a sentence less than ten years to life minimum. The prosecutor and court eschewed that option as illegal. Counsel then suggested that the People permit Mask to plead guilty to Grand Larceny, which would allow Mask to avoid classification as a mandatory persistent violent felony offender. To do so, however, the court observed that it would have to approve the dismissal of the pending counts and that it could find no justification for such dismissal. The prosecutor reiterated that it was illegal for her to avoid filing the predicate felony statement and that she had consulted with several senior trial assistants, all of whom agreed that the minimum that she could offer was ten to life.

There were no further plea negotiations and the case proceeded to trial. After Mask was convicted, the parties discovered that he was not a persistent violent felony offender but was a second violent felony offender.[2] Mask was sentenced consistent with that status.

---

[2] The minimum Mask could have received on each count of Robbery in the First Degree was a prison term of from six to twelve years and the maximum was a prison term of from 12 and

The Post-Judgment Proceedings In State Court

On January 2, 1994, Mask moved the Supreme Court, New York County (Andrias, J.)[3] for an order vacating the judgment, pursuant to N.Y. Criminal Procedure Law Section 440.10. Mask alleged that he had been denied the effective assistance of trial counsel because of counsel's misapprehension of his true sentencing status. According to Mask, counsel's mistake as to that status resulted in the foreclosure of plea negotiations for a sentence that would have been shorter than the sentence received after trial. According to Mask, this error, by itself, constituted ineffectiveness under both federal and state constitutional standards.

In support of this claim, Mask appended the minutes of various calendar calls in which plea negotiations occurred and which, he alleged, demonstrated the prosecutor's willingness to reduce the offer to him but for her misperception that she could not legally do so. Mask's appellate attorney also submitted an affirmation in which he relayed a conversation he had had with Mask's trial counsel in which that attorney had stated that he had been under "the impression" that the prosecutor had been willing to offer a sentence of less than the ten to life offer but for

---

½ to 25 years. New York State Penal Law Sections 70.04(3)(a), (4).

[3] The Honorable Richard T. Andrias presided over the plea negotiations and Mask's trial.

the mistaken impression that any lesser sentence was illegal. In addition, he advised appellate counsel that Mask had refused the offer of from ten to life because he maintained his innocence. Mask also submitted an affidavit in which he avowed that

> Prior to this case going to trial, I was willing to consider pleading guilty if the prosecutor had offered a guilty plea with a sentence of less than 10 years to life. I rejected the 10 years to life plea offer because this offer was not reasonable. A plea offer that I would have considered to be reasonable would have been 8 to 16 years.

The prosecutor opposed the motion. The prosecutor did not deny that the negotiations had occurred as Mask had alleged. Instead, the prosecutor asserted the procedural bar of New York State Criminal Procedure Law Section 440.10(2)(b), which provides that a 440.10 motion must be denied if the "judgment is appealable and there exist sufficient facts on the record to permit adequate review" of the defendant's claim. The prosecutor asserted that the record contained all the facts necessary to permit a review of Mask's claims. The People also argued that, under New York State law, the test was whether Mask's representation as a whole had been effective. Here, when all of counsel's conduct was examined, it was clear he had been effective.

The court denied Mask's motion. The court found, as a matter of fact, that Mask's claim that the prosecutor would have made an offer in the range that he was willing to consider, had no mistake been made, was based on speculation: the prosecutor had never expressed a view that from eight to sixteen years was acceptable and Mask had

not asserted unequivocally that he would have agreed to it. Furthermore, the court noted that its acceptance of the sentence that Mask seemed to feel was reasonable should not have been presumed. Since Mask had failed to demonstrate that, but for the error as to his sentencing status, he would have been offered a more advantageous bargain or that he would have accepted it had it been offered, the court rejected his claim.

The Appeal To The Appellate Division

Mask was granted leave to appeal from the order denying his Criminal Procedure Law Section 440.10 motion and that appeal was consolidated with his direct appeal to the Supreme Court of the State of New York, Appellate Division, First Department. On that appeal, Mask argued, among other things, that, as a result of counsel's mistake as to his sentencing status he was deprived of effective assistance of counsel. In support of his claim, Mask referred to all of the evidence that had been before the motion court.

On January 9, 1996, the Appellate Division unanimously affirmed the judgment of conviction. Referring to New York state jurisprudence concerning ineffective assistance of counsel, the court held that counsel's mistake did not constitute ineffectiveness since counsel's representation, when viewed as a whole, was adequate. The court also determined that:

> There was no reasonable probability that a more favorable plea bargain would have been struck but for the mistake . . . , nor that even if such were possible, that [Mask]

would have accepted such plea in light of his reported protestations of innocence.

People v. Mack, 223 A.D.2d 383, 384, 637 N.Y.S.2d 2 (1st Dept. 1996).

On January 23, 1996, Mask sought leave to appeal to the New York State Court of Appeals. On August 20, 1996, that application was denied. See People v. Mask, 88 N.Y.2d 1069, 649 N.Y.S.2d 395 (1996).

The Proceedings In Federal District Court

On August 13, 1997, Mask filed a petition in the United States District Court for the Southern District of New York for a writ of habeas corpus pursuant to 28 U.S.C. §2254. In that petition, he renewed the claim of ineffectiveness of counsel grounded in the mistake as to his sentencing status.

The United States District Court for the Southern District of New York, asserting jurisdiction under 28 U.S.C.§2254, conditionally granted Mask's petition unless Mask was resentenced to a term of from eight to sixteen years or his conviction was vacated and he was granted a new trial. Mask v. McGinnis, 28 F.Supp.2d 122, 126 (S.D.N.Y. 1998).

Citing Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985), and United States v. Gordon, 156 F.3d 376 (2d Cir. 1998), that court concluded that a defendant's constitutional right to effective assistance at the plea bargaining stage could be violated when an attorney made the type of mistake made here. Mask v. McGinnis, 28 F.Supp.2d 124-25. It also concluded that a defendant could

establish prejudice from that error, a necessary element of an ineffective assistance of counsel claim, by demonstrating that he would have accepted the offer had counsel been effective. Id. at 125. The court then reviewed the record here and found that, had the mistake been rectified, the prosecutor would have made Mask the type of offer that Mask believed was reasonable, and that he would have accepted it. Id. at 125-26. Petitioner filed a timely notice of appeal.

The Appeal To The Second Circuit

Petitioner made two claims before the Second Circuit. First, petitioner pressed the point that the district court had failed to accord any deference to the factual findings of the state courts, as required pursuant to 28 U.S.C. Sections 2254(d)(2) and (e)(1). Petitioner also asserted that the district court could not have granted Mask relief unless the state court's determination was contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. Section 2254(d)(1). Since this Court has not ruled that a defendant establishes ineffectiveness by demonstrating that his attorney's mistake foreclosed plea negotiations and resulted in defendant's proceeding to a concededly fair trial, the district court had ignored the mandate of 2254(d)(1).

The Second Circuit affirmed the district court's order. The court focused exclusively, in the main body of its opinion, on the reasoning of the state motion court. The federal court found that that court had unreasonably applied the Strickland test when it held that Mask had not shown that "but for the error, which was shared by all parties . . . he would have been offered and would have accepted a more advantageous bargain." Since the court concluded

that the motion court's factual determinations had been made by applying an incorrect legal standard, it held that it was not required to accord any deference to any of those determinations under 28 U.S.C. §2254 (e)(1). Mask v. McGinnis, 233 F.3d 132, 140 (2d Cir. 2000).

In a footnote, the Second Circuit recognized that the Appellate Division had "recited" the correct legal standard. Nonetheless, the court stated, it was not required to accord the state court's factual findings any deference under 28 U.S.C. §§2254(d)(2), (e)(1) since it could do so only when it was convinced "that the state court had, in fact, considered the factual issue that [the Second Circuit] determine[d] dispositive." Mask v. McGinnis, 233 F.3d at 140-41, n. 5.

In that same footnote, the court continued that:

> "[t]o the extent, instead, that the Appellate Division's decision can be read to have applied the 'reasonable probability' standard to a finding that no prejudice was shown to a certainty, and to have concluded that therefore no probability of a different sentence was shown, it applied Supreme Court precedent in an unreasonable fashion and, hence, is not entitled to our deference under §2254(d)(1)." Id.

The court then endorsed the district court's de novo review of the evidence before the state court and affirmed its conditional grant of the writ. Id. at 142.

REASONS FOR GRANTING THE WRIT

Introduction

Since this Court's decision in Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1479 (2000), three circuits have directly addressed how to evaluate a state court's decision under 28 U.S.C. §2254(d)(1). The Fourth and Fifth Circuits have concluded that their review is limited to the state courts' holdings; they are not to consider the state courts' analyses or lack thereof in determining whether the holdings are contrary to or constitute an unreasonable application of Supreme Court precedent. The Second Circuit has taken the opposite approach. It has concluded that it can accord a state court's holding no deference unless the state court has explained its reasoning in detail sufficient to satisfy that court. As a result, the circuits are now split as to how to review a state court's determinations under 28 U.S.C. §2254(d)(1).

In addition, this Court has explained that the test enunciated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), is to be used when a defendant claims that counsel's errors impacted on procedural or substantial rights. This Court has not yet addressed what test is to be used when the rights affected do not rise to this level. In the absence of guidance, the Second Circuit utilized the Strickland test and arrived at a decision opposite to that of the state court. As this case demonstrates, then, guidance is needed in resolving claims such as Mask's.

These two questions are of extreme importance. As to the first question, the Second Circuit has essentially devised a loophole by which it can avoid the mandate of

the AEDPA, thus exposing the state courts in this circuit to greater scrutiny than the courts of other circuits. As to the second issue, the Second Circuit's ruling that poorly negotiated plea bargaining entitles a defendant to relief has the effect of undermining convictions after trial; it permits criminal defendants to claim that, had their attorneys been more effective advocates, they could have negotiated more favorable plea bargains and permitted the defendants to avoid trial.

I. As A Result Of The Second Circuit's Decision, The Circuits Are Split On How To Determine Whether To Apply The AEDPA To State Court Decisions

In Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1479 (2000), this Court construed 28 U.S.C. 2254(d)(1). In doing so, this Court did analyze, at length, the Virginia Supreme Court's opinion underlying the case, including a review of the Virginia court's reasoning. The Court, however, did not mandate such analysis. Thus, in a post Williams v. Taylor case, the Fifth Circuit rejected any such requirement. In Neal v. Puckett, No. 99-60511, 2001 U.S.App. LEXIS 659 (5th Cir. 2001), that court stated "even after Williams, it is not immediately clear to us whether a federal habeas court looks exclusively to the objective reasonableness of the state court's ultimate conclusion or must also consider the method by which the state court arrives at its conclusion." Id. at *36. As a result, though the Neal court acknowledged this Court's scrutiny of the Virginia Supreme Court's reasoning in Williams v. Taylor, it observed that, with the exception of the Seventh Circuit's conflicting opinions on the question,[4] the other circuits to have considered the

[4] In Lindh v. Murphy, 96 F.3d 856, 871 (7th Cir. 1996) reversed on other grounds, 521 U.S. 320, 117 S.Ct. 2059 (1997), the

matter prior to Williams concluded that they should focus only on the outcome and not the written explanation and adopted that view. No. 99-60511, 2001 U.S.App. LEXIS 659 at *38.[5]

The other circuit to have explicitly discussed this question after Williams v. Taylor is the Fourth Circuit. In Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000), the habeas court reviewed a state court's summary order denying the defendant's constitutional claim. The court adopted its reasoning in Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998), that the appropriate test was not whether the state court's ruling was well-reasoned but whether it was "minimally consistent with the facts and circumstances of the case." 236 F.3d at 159, quoting Wright, 151 F.3d at 157.

By deciding Mask v. McGinnis in the manner that it did, the Second Circuit diverged sharply from the rule in these two circuits. The Second Circuit refused to limit itself to an evaluation of whether the conclusion of the highest court to review Mask's claim was reasonable based on the record before it. Indeed, the Second Circuit even refused to

---

Seventh Circuit held that 2254(d)(1) requires federal courts to consider the care with which state courts considered the relevant federal issues. Since then, the Seventh Circuit has stated that it would not review whether the state court's decision was well reasoned but instead would look to see whether that decision was "at least minimally consistent with the facts and circumstances of the case." Schaff v. Snyder, 190 F.3d 513, 523 (7th Cir. 1999); see also Hennan v. Cooper, 109 F.3d 330 (7th Cir. 1997).

[5] The Fifth Circuit cited Long v. Humphrey, 184 F.3d 758 (8th Cir. 1999) and O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998).

begin its review by according the state court's determination any deference.

First, the Second Circuit focused its discussion in the body of its opinion on the state motion court's conclusion that Mask had not shown that "but for" counsel's error, Mask would have received a more advantageous plea offer. As the Second Circuit saw it, this reasoning constituted an unreasonable application of the Strickland standard since the motion court had applied a "certainty" test to the question of prejudice. Mask v. McGinnis, 233 F.3d at 140. The Court then explained in its footnote that it recognized that the Appellate Division had "recited" the correct "reasonable probability standard" for evaluating prejudice under the second prong of the Strickland test. Nonetheless, that court asserted that it could not give deference to the Appellate Division's determination that Mask had failed to meet that standard unless that court had made clear that it had considered what the Second Circuit deemed to be the correct factual issues. Without that explicitness, the Second Circuit found that the state court's "summary recitation" of the correct standard was insufficient to correct the lower court's errors. In fact, the Second Circuit continued, it would assume that the Appellate Division's had done no more than "applied the 'reasonable probability' standard" to the lower court's conclusion, based on the erroneous certainty standard, that no prejudice was shown. Since the Second Circuit believed that this constituted an unreasonable application of Strickland, it concluded that it could accord the state's determinations no deference pursuant to 28 U.S.C. §2254(d)(1). Id. at 140-41, n. 5.

By this analysis, the Second Circuit made clear that it believes that a federal habeas court must look behind a

state court's holding to assure itself that the state court has done what the Second Circuit would have done had it reviewed the habeas claim on direct federal appeal. Since, here, the Appellate Division had not been sufficiently explicit as to what it had done, the Second Circuit had no confidence in its analysis. Thus, it concluded that the state court's reasoning was entitled to no deference under §2254(d)(1). This approach is substantially different from that of the Fourth and Fifth Circuits.

The need for resolution of this difference among the Circuits cannot be underestimated. First, the Second Circuit's ruling flies in the face of the AEDPA's goal of increasing the deference accorded to state court decisions. Williams v. Taylor, 529 U.S. 362, 120 S.Ct. at 1521 n.*. Additionally, the Second Circuit's ruling has the effect of requiring the state courts to write opinions detailing their analysis if they wish to avail themselves of the protections of the AEDPA. Quite obviously, such a requirement is at odds with this Court's previous pronouncements that federal courts have no power to tell state courts how to write their opinions. See e.g. Coleman v. Thompson, 501 U.S. 722, 739, 111 S.Ct. 2546 (1991).

Moreover, the manner of analysis utilized in examining state court adjudications has ramifications not just in cases like this, where the state court's opinion provided a brief explanation of its reasoning, but also in those cases in which the state courts issue affirmances without opinions or in which the state opinion recites state law in resolving a federal claim. In fact, in a case decided subsequent to Mask, the Second Circuit extended its reasoning in Mask to this latter situation. In Washington v. Schriver, No. 00-2915, 2001 U.S. App. LEXIS 129 (2d.

Cir. 2000),[6] the court held that a habeas court could consider a state court decision an "adjudication on the merits" for the purposes of the AEDPA only if that decision cited controlling Supreme Court case law or state court precedents which themselves applied relevant federal law. Id. at *22. Even the Second Circuit recognized that it stands alone in this holding. Id. at *22, n.5.[7]

In short, given the ramifications of the Second Circuit's method of analysis, petitioner respectfully submits that the issues raised in Mask are of great importance.

II. In The Wake Of Williams v. Taylor, Guidance Is Needed On How To Resolve Claims of Ineffective Assistance Of Counsel When A Defendant Protests An Error At The Plea Bargaining Stage Of A Proceeding And The Defendant Received A Fair Trial

In granting Mask habeas relief, the Second Circuit concluded that it was required to apply the Strickland two-pronged test to Mask's claim. The court also ruled that Mask could satisfy the prejudice prong if he established

---

[6] While the Washington court concluded that it could not accord the state court's determination the deference mandated by the AEDPA, it held that the trial court's exclusion of certain expert testimony offered by the defense did not rise to the level of constitutional error and thus affirmed the district court's dismissal of the petition. 2001 U.S.App. LEXIS at *45.

[7] Indeed, its approach conflicts with that of the Tenth Circuit. See Paxton v. Ward, 199 F.3d 1197, 1208-09 (10th Cir. 1999)(in case in which state court's decision relied on state law, habeas court reviews that decision pursuant to 28 U.S.C. §2254(d)(1) solely to see whether the state court's ruling was reasonably supported by the record and whether its legal analysis was constitutionally sound).

that the prosecutor would have made him a more favorable offer but for counsel's mistake and that he would have accepted it. In denying petitioner's subsequent request for a panel rehearing or en banc review, the Second Circuit also rejected petitioner's argument that a defendant who rejected a plea offer but received a fair trial did not suffer constitutional prejudice.

In holding as it did, the Second Circuit misapplied Strickland. In Williams v. Taylor, this Court stated that the Strickland test was to be utilized to resolve claims of ineffectiveness in which counsel's conduct deprived a defendant of a substantive or procedural right. 529 U.S. 362, 120 S.Ct. at 1513. A defendant has no right to be offered a plea bargain, Mabry v. Johnson, 467 U.S. 504, 104 S.Ct. 2543 (1984), or to have his guilty plea accepted. Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495 (1971). Since Mask's claim was only that his attorney's mistake muddled plea negotations, Mask suffered no denial of a procedural or substantive right and the Strickland test was inappropriately applied here.

This Court has yet to announce the correct test to be applied to claims such as this[8] and petitioner submits that

---

[8] The district court erroneously believed that this Court resolved this issue in Hill v. Lockhart, 474 U.S. at 52, 106 S.Ct. at 366. Mask v. McGinnis, 28 F.Supp.2d at 124. In fact, this Court's holding in Hill is consistent with its statement in Williams concerning the Strickland test. In Hill, this Court extended Strickland to challenges to guilty pleas based on claims of ineffective assistance. 474 U.S. at 58, 106 S.Ct. at 370. Of course, when a defendant pleads guilty, he waives certain constitutional rights and protections. Thus, his claim that he made such a waiver is equivalent to an assertion that he was

this question constitutes one of extreme importance. A number of state courts have been confronted with the question of how to resolve claims that counsel's conduct at the plea stage caused defendants either to reject offers or the government to fail to offer those defendants more favorable sentences. The state courts have felt themselves constrained to utilize the Strickland standard in resolving those claims.[9] Since their holdings are premised on what this Court has made clear is an incorrect analysis, correction is needed.

As the significant number of cases involving claims of ineffectiveness at the plea bargaining stage makes clear, this is an issue affecting almost all of the states and a number of federal jurisdictions. Since the Strickland test is not the appropriate one by which to resolve these attacks on convictions, the courts need to be informed as to how to review such claims.

---

denied certain substantial rights, something that Strickland obviously governs.

[9] See e.g. State v. Garrison, 2000 Tenn. LEXIS 652 (Tenn. 11/22/2000); Cottle v. State, 733 So.2d 963 (Fla. 1999); People v. Curry, 687 N.E.2d 877 (Ill. 1997); Lloyd v. State, 373 S.E.2d 1 (Ga. 1988). At least one court has recognized that defendants who proceed to trial, as a result of their attorney's conduct, are differently positioned from those whose decision to forgo a trial and plead guilty is based on counsel's ineffectiveness. See Johnson v. Commissioner, 652 A.2d 1050, 10057 (Conn. App. Ct. 1995). Several courts have commented on the difficulties in fashioning relief when the defendant has been accorded a fair trial. Harris v. State, 875 S.W.2d 662, 666 (Tenn. 1994); People v. Curry, 687 N.E.2d at 890-91; Williams v. State, 605 A.2d 103, 110-11 (Md. 1992); State v. Kraus, 397 N.W.2d 671, 674 (Iowa, 1986).

CONCLUSION

For the aforementioned reasons, petitioner, Michael McGinnis, respectfully requests this Court to find (1) that there is a split among the circuits as to how to review the analyses used by the state courts in resolving federal questions and that the Second Circuit's position is at odds with the intent of the statute, and (2) that the Second Circuit's reliance on the Strickland test was inappropriate in this situation.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney, New York County

MORRIE I. KLEINBART
SUSAN AXELROD*
Assistant District Attorneys

New York County District Attorney's Office
1 Hogan Place
New York, New York 10013
(212) 335-9253

*Counsel of Record for the Petitioner

March 26, 2001